IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.855 OF 1990

The Board of Trustee of
the Port of Bombay ...Appellant

vs.

Zenith Limited ...Respondent

Mr.U.J.Makhija a/w Mr.Parag Khandkar for the Appellant

CORAM: A.S.OKA,J.
DATE : DECEMBER 17,2007.

ORAL JUDGMENT:

1. Heard learned Counsel for the Appellant. The Appellant is the original defendant. There is a money decree passed against the Appellant in the sum of Rs.28,275.04 with interest thereon at the rate of 6% p.a. from the date of decree till realisation of the amount.

2. With a view to appreciate the submissions made by the learned counsel for the parties, it will be necessary to refer to the facts of the case in brief :

. The respondents-plaintiffs imported 65 bales of waste paper from U.S.A. The said consignment of the 65 bales of waste paper was detained by the Custom for the purpose of checking. It is the case of the Respondents that the authorities of the customs released the said consignment without any warning or penalty as the import of the item was found to be bonafide and as per the I.T.C. rules. The plaintiffs requested the custom authorities to issue detention certificate for the delay

caused in releasing the documents. As the respondents urgently wanted the paper consignment, they paid demurrage charges without waiting for issuance of detention certificate by the custom authority. Thereafter, the respondents-plaintiffs submitted a refund application to the Appellant requesting them to refund of 80% of the total demurrage charges amounting to Rs.51750.00.

3. Reliance has been placed by the Respondents on correspondence between the parties and in particular a letter dated 4th April 1985 sent by the Respondents to the Appellant. By the said letter 80% remission of the demurrage amount was demanded by the Respondents. The demand was in the sum of Rs.41,400/-. By a letter dated 7th March 1986 the Appellants responded stating that they have sanctioned the remission of demurrage amounting to Rs.25,825/- on ex-gratia ground. In response to the letter dated 25th September 1986 sent by the respondents, the Appellants by their reply dated 12th February 1987 informed the respondents that the appellants have already filed a suit against the respondents for recovery of sale deficit and therefore, the Appellants were unable to release the refund of Rs.25,825/-. A notice was issued by the Advocate for the Respondents on 4th May 1987 calling upon the Appellants to pay a sum of Rs.28,275.04. The said notice was not replied by the Appellants. Thereafter, there was a further notice issued by the Advocate for the Respondents on 5th June 1987. As there was no response by the Appellants,

the Respondents filed a suit for recovery of a sum of Rs.25,275.04 with interest.

4. The Appellants filed a written statement contending that the statutory notice as required under section 120 of the Major Port Trusts Act,1963 has not been served by the Respondent. It was submitted that the suit is barred by limitation in as much as the suit ought to have been filed within a period of six months from the date of refusal by the Appellants to pay the said amount. It is pointed out that the date of refusal will have to be treated as 29th June 1985. Thus, the contention is that the suit was barred by limitation. The Appellants denied that they were liable to pay Rs.28,275.04.

5. The trial court framed various issues including the issue of bar of limitation. None of the parties have led any oral evidence and the submissions were advanced before the trial court on the basis of documents produced by the parties. The trial court held that the suit was within limitation and there was a proper statutory notice issued by the Respondents before the institution of the suit. The trial court therefore proceeded to pass a decree as stated earlier.

6. The submission of the learned counsel for the Appellants is that the suit was clearly barred by limitation as the same was not filed within the period of six months from the date of

accrual of the cause of action. He submitted that even assuming that the Appellants had agreed to pay the said amount it was subject to adjustment of the larger claim of the Appellants against the Respondents and for recovery of the larger claim, a suit has already been instituted by the Appellants. He submitted that there was no proper notice as required by section 120 of the said Act of 1963. He placed reliance on the decision of the Apex Court in case of Trustees of Port of Bombay Vs. Premier Automobile Ltd. (A.I.R. 1974 S.C. page 923) and submitted that the decree passed by the trial court is illegal. None appeared for the Respondents.

7. I have given careful consideration to the submissions made by the learned Counsel for the Appellants. It will be necessary to refer to the averments made in the plaint. Reliance has been placed by the Respondents-plaintiffs on correspondence made between the parties. Reliance has been placed on a letter dated 7th March 1986 which has been admitted by the Appellants. In the said letter sent by the Appellants to the Respondents it is stated thus :

. I am directed to refer to your letter No.IMP/GLS/N 84-85 dated 4th April 1985 on the above subject and to state tat a remission of demurrage fees amounting to Rs.25,875/- (Rupees twenty five thousand eight hundred seventy five only) has been sanctioned on Ex-Gratia grounds..."

8. In response to the letter dated 25th September 1986 sent by the Respondents, the Appellants replied on 12th February 1987 contending that they were unable to release the refund voucher amounting to Rs.25,872.00 as the Appellants have already filed a suit against the Respondents for recovery of sale deficit. Thereafter, on 4th May 1987 a notice of demand was issued by the respondents to the Appellants. The claim is based on the letter dated 7th March 1986 by which the Appellants agreed to pay demurrage fee amounting to Rs.25,875.04. Refusal to pay the said demurrage fee on the part of the Appellants was on the footing that the Appellants have filed a suit for recovery against the Respondents. The other claim made in the suit is in respect of a sum of Rs.1889.64 on basis of refund voucher in the said amount issued by the Appellants on 18th September 1984. The third claim is on account of recovery of a sum of Rs.5105.40 which is payable by the Appellants under the refund voucher dated 5th November 1985. A demand was made for payment of the said amount by the Respondents by notice dated 4th May 1987 followed by notice dated 9th May 1987. The notice dated 9th May 1987 contains brake up of the amounts claimed in the notice dated 4th May 1987.

9. The first question to be considered is whether the claim in the suit is barred by limitation. The plaint was admittedly lodged on 31st August 1987. Under section 120 of

the said Act of 1963 it is provided that no suit or other proceeding shall be commenced against the Appellants until expiration of the one month after the notice in writing is given to the Appellants stating cause of action or after six months after the accrual of cause of action whichever is earlier. Under sub section 2 of section 15 of the said Act of 1963 while computing the period of limitation for filing the suit, the plaintiff is entitled to exclusion of notice period under section 120 of the said Act of 1963.

10. By a communication dated 7th March 1986, in response to letter dated 4th April 1985 sent by the Respondents the Appellants were offered a remission of demurrage fee amounting to Rs.25,875.04. In the letter dated 7th March 1986, the Appellants specifically stated that the Deputy Docks Manager, Refunds, P & V. Docks, Bombay-400 009 will arrange for payment of the said amount. For the first time by communication dated 12th February 1987 the Appellants declined to pay the said amount on the ground that the suit for recovery has been filed by the Appellants. Thus, the accrual of cause of action is on the basis of the letter dated 12th February 1987 referred to above. If the notice period under section 120 of the said Act of 1963 is excluded, the suit filed on 31st August 1987 is obviously filed within the period of six months from the date of the accrual of the cause of action. Therefore, the trial court has rightly held that the suit filed by the Respondents was within limitation.

11. It was submitted that the notice issued by the Appellants on 4th May 1987 was not in compliance with requirement of section 120 of the said Act of 1963. It was submitted that the notice does not disclose the cause of action. Perusal of the said notice shows that the same incorporates all the facts on which the cause of action for filing the suit has been founded. The notice discloses the cause of action and therefore the trial court has rightly held that the notice is legal and valid.

12. At this stage a reference will have to be made at paragraph 7 of the written statement filed by the appellants. It was contended by the Appellants that they had withheld the amount payable to the Respondents as they have already filed a suit for recovery of the larger amount from the Respondents. The Appellants themselves communicated to the Respondents by a letter dated 7th March 1986 the decision to pay Rs.25,875.00 by way of remission of demurrage fee. Therefore, there was no occasion for the Appellants to claim any adjustment of the said amount. Thus, the liability of the Appellants was clearly established before the trial court. It is pertinent to note that all the documents on record were admitted by the Appellants and they have not led any oral evidence. The trial court granted interest only at the rate of 6% p.a.

13. In view of the aforesaid discussion, there is no merit in

the Appeal and the same is accordingly dismissed with no order as to costs.

JUDGE